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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1914

ADAM J. WESTERMAYER, ET AL.,

Petitioners,

vs.

THE PULLMAN COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable, The Chief Justice and Associate Justice of the Supreme Court of the United States:

The petitioner, Adam Westermayer, et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this proceeding.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Seventh Circuit appears in the appendix hereto. The Opinion of the District Court for the Eastern District of Missouri and the Opinion of the District Court for the Northern District of Illinois appears in the appendix hereto.

JURISDICTION.

The order of the Court of Appeals for the Seventh Circuit was entered on April 25, 1974. This Petition for Certiorari is filed within ninety days of that date.

The Courts jurisdiction is invoked under 28 U. S. C. Section 1254(i).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Seventh Circuit is in direct conflict with *Glover* v. *St. Louis-San Francisco Railway Co., et al.*, when it held that an action could not be maintained by petitioners because of their failure to exhaust their administrative remedies?

2. Whether the Seventh Circuit is in direct conflict with *Czosek* v. *O'Mara* in denying petitioners a right to judicial review in their action against the unions for breach of the duty of fair representation regardless of their use or nonuse of administrative remedies?

STATUTORY PROVISIONS INVOLVED.

28 U. S. C. § 1337

> § 1337. *Commerce and anti-trust regulations.*
>
> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

45 U. S. C. § 153, SECOND

> *System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Meditation Board, neutral member, compensation, quorum, finality and enforcement of awards.*

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select

an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that

apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189; June 20, 1966, Pub. L. 89-456, §§ 1, 2, 80 Stat. 208, 209; Apr. 23, 1970, Pub. L. 91-234, §§ 1-6, 84 Stat. 199, 200.

STATEMENT OF THE CASE.

This is a class action law suit brought by eight (8) members of Railroad Brotherhoods for themselves and for all other employees of defendant Pullman Company who were members of either the Sheet Metal Workers' International Association, the International Brotherhood of Firemen and Oilers, the International Brotherhood of Electrical Workers, the International Association of Machinists and Aerospace Workers, the Brotherhood Railway Carmen of America, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers who were on active service with the Pullman Company on and after October 17, 1968, but who were discharged prior to January 1, 1969, and who were denied separation allowances after their discharge. The complaint was brought against the Pullman Company and the six (6) unions claiming that the agreement entered into between the Pullman and the unions denying separation allowances to the plaintiffs was entered into in violation of Article 45, Section 152 U. S. C. A.

The plaintiffs maintained in their complaint that the defendants conspired so as to ignore the will of the members of the unions as voiced in their strike ballot, that defendant Pullman did not bargain fairly and non-discriminately with the railroad unions, that the defendant unions willfully failed to represent the wishes of the majority of its members, especially the plaintiffs, and defendant Pullmn Company know of this when it entered into the agreement.

The Pullman Company thereafter filed a Motion to Quash Service of Summons alleging that the purported service was invalid, as well as a Motion to Dismiss claiming that the plaintiffs failed to state a claim against Pullman upon which relief can be granted. The defendant unions filed a Motion for Summary Judgment based upon the grounds that the complaint failed to state a claim for which relief may be granted in that undisputed material and relevant facts show that the Court lacks jurisdiction to entertain the action, and that the defendant unions are otherwise entitled to judgment as a matter of law.

The motions and subsequent memorandums of law in support thereof filed with the District Court for the Eastern District of Missouri, along with exhibits were presented and argued before the District Court. The District Court for the Eastern District of Missouri, in two separate memorandums and orders, denied the motions of Pullman and the unions to dismiss for lack of subject matter jurisdiction; denied the unions' Motion for Summary Judgment holding that there were genuine issues of material facts; granted defendant Pullman's Motion to Quash service of process made in Chicago, Illinois.

A subsequent petition for re-consideration filed by defendant unions was thereafter denied by the District Court.

A motion to transfer the cause to the Northern District of Illinois was filed by the plaintiffs, and accordingly, the cause was transferred to the Northern District of Illinois sitting in Chicago, Illinois.

Thereafter, defendant unions filed a Motion to Dismiss or in the Alternative for Summary Judgment and defendant Pullman filed a motion to Dismiss, both setting out substantially the same grounds as those presented to the District Court for the Eastern District of Missouri.

The District Court for the Northern District of Illinois then granted the defendant Pullman's and defendant unions' Motions to Dismiss holding that the Court presently lacked juris-

diction over the instant controversy since the plaintiffs have failed to exhaust or even initiate their contractual and administrative remedies and have not alleged any reason for their failure to so act, and also that it was not within the Court's peculiar jurisdiction to interpret, apply or reform the provisions of collective bargaining agreements or to adjudicate disputes arising thereunder.

From that ruling, an appeal was taken to the Seventh Circuit and that Court affirmed the District Court for the Northern District of Illinois holding that the Federal Court lacked jurisdiction as a result of the Petitioners failure to exhaust their administrative remedies.

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Is in Direct Conflict with This Court's Decision in the Case of Glover, et al. v. St. Louis-San Francisco Railway Co., et al.

This Court, in *Glover, et al.* v. *St. Louis-San Francisco Railway Co., et al.*, 393 U. S. 324, 89 S. Ct. 548, 21 L. Ed. 2d 519, decided a case that on its facts is most similar to the case at issue. In that case, the petitioners, a group of negroes and whites employed as carmen helpers by the Frisco Railroad, brought an action for damages and injunctive relief against the railroad and their union claiming that the defendants acted in concert to bar negroes from promotion wholly because of race. Both the District Court and the Court of Appeals dismissed the amended complaint upon the grounds that plaintiffs failed to exhaust their contractual or administrative remedies. The Supreme Court, however, reversed and remanded the case holding that the Federal Courts have jurisdiction over this action which essentially involves a dispute between some employees on the one hand and union and management together, on the other,

and not a dispute between employees and a carrier concerning the meaning of the terms of a collective bargaining agreement, over which the Railroad Adjustment Board would have exclusive jurisdiction under the Railway Labor Act. The Court in effect held that the petitioners need not exhaust the remedies administered by the union and the railroad and to hold otherwise would be to ask the union and the company to pass upon claims by the very employees whose rights they have been charged with neglecting and betraying. The Court in a concurring opinion written by Justice Harlan cited *Richardson* v. *Texas & N. O. R. Co.*, 242 Fed. 2d 230 (1957), holding that the Federal Court may grant railroad employees ancillary relief against an employer who aids and abets their union in breaching its duty of fair representation. He stated that a contrary result would bifurcate, and needlessly proliferate, litigation.

In the Glover case, the petitioners claimed that it made frequent requests to the company and to the union to remedy the injustices that were incurring to them but they were all to no avail. So in the case at issue, as supported by the eight (8) affidavits filed by the eight (8) named plaintiffs, the employees affected made frequent requests to both the union and the company only to be told by the union representative and the company superintendent that nothing could be done and to proceed further would be fruitless. To then require the plaintiffs to go further after being refused any and all help and totally discouraged and denied by the union representative and the company representative would be an unfair burden upon the plaintiffs and a denial of due process of law. Just as in the Glover case, where it was alleged that the bargaining representatives of the car employees had been acting in concert with the railroad employer to set up schemes and contrivances to bar negroes from promotion wholly because of race and where the Court held that insistence that the petitioners exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these peti-

tioners according to their allegations are justly and legally entitled, so here we have the exact situation.

Since the Supreme Court decision in the Glover case was rendered, the applicable principles of law involved have often been cited and approved by the Federal Courts.

In *United States* v. *Jacksonville Terminal Co., et al.*, 451 F. 2d 454, the District Court held that "under the Railway Labor Act, Federal Courts have had the power to protect employees against invidious discrimination." Also, in *Nemitz* v. *Norfolk and Western Railway Co.*, 436 F. 2d 841, the District Court again recognized the law as set out in *Glover* when it held that if it is apparent from the record that it would be a futile gesture to proceed under arbitration, then such exhaustion of administrative remedies is not required and the employees' action may be brought in the Federal Court. The Glover decision was again cited by the Court in *Retana* v. *Apartment, Motel, Hotel and Elevator Operators Union, et al.*, 453 F. 2d 1025 when the Court held:

> "Where, as here, the complaint seeks to allege a justifiable excuse for failure to exhaust administrative remedies, general allegations suffice, and the complaint may not be dismissed unless the Court is 'unable to say beyond a doubt that plaintiff's allegations' . . . are insufficient to excuse their failure to exhaust the grievance provisions of their contract."

Other recent Federal Court decisions following the *Glover* case included *Smith* v. *Pittsburgh Gage and Supply Co.*, 464 F. 2d 870, *Tidwell* v. *American Oil Co.*, 332 F. Supp. 428, and *Deboles* v. *Trans World Airlines, et al.*, 350 F. Supp. 1284.

Based upon these decisions, and because the plaintiffs did not need to exhaust their administrative remedies prior to filing this action in light of the circumstances, and because the action is not based upon an interpretation application, or modification of the agreement, the trial court should be reversed.

II.

The Decision Below Is in Direct Conflict with This Court's Decisions in the Case of Czosek v. O'Mara.

Petitioner here asks the Court to review this case not only standing alone but also in conjunction with a Petition for Rehearing of the denial of a Petition for Writ of Certiorari filed by Evo R. Manzardo and others against the same defendants as here, said cause number being 73-1482. Both cases involve charges of unfair representation against the *same* unions over the *same* contract and disputes arising thereunder. In effect, the law clearly provides a judicial remedy to petitioners in both cases whether their administrative remedies are exhausted or not.

This Court has long held that a labor organization, particularly one in the railroad industry, has a special duty to fairly represent all employees in the bargaining unit whether or not they are members of that Union. The issue was presented to the Court and decided in the landmark case of *Steele* v. *Louisville and N. R. Co.*, 323 U. S. 192.

After clearly establishing that the members of the bargaining unit, even though a minority, have rights which must be protected, the Court then went on to consider what, if any, effect the Railway Adjustment Board and its availability to those members could have upon these rights of the bargaining unit members. The Court noted that the Adjustment Board has authority to grant relief as to petitioning employees against the employer. However, this court said that the authority in the Board is incomplete, particularly as to the rights of the minority employees against the labor union. This Court concluded that the employees must necessarily have the right to bring an action in court against the Union for damages which they may have suffered at the hands of their bargaining representative by its failure to adequately represent them.

> We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty. 323 U. S. 226 at page 207.

Following this clear statement of the rights of bargaining unit members, the Court has frequently been faced with various arguments by the Unions, which have attempted to frustrate the Union member's resort to the judicial system for damages based on a failure to represent. One of the clearest examples of this type of procedural defense interposed by a labor union as to the rights of its members to seek judicial remedies for breach of a duty to fairly represent is the case of *Czosek* v. *O'Mara,* 397 U. S. 26.

In that case we have employee members who were terminated by the employer-railroad and attempted to have the question of the propriety of their discharge litigated by the Railway Adjustment Board. However, the union refused to process the grievances and the employees brought an action against the union in the Federal District Court. The union defended by contending that the complaint was defective. It contended that the action should be dismissed because the complaint against the railroad was improper in that the members had failed to exhaust the administrative remedy under the Railway Labor Act. Also the Union moved to dismiss the complaint against them because the complaint failed to adequately allege a breach of duty and because the employees could have processed their own grievances. The District Court granted the motions and dismissed the complaint. Thereafter the Court of Appeals reversed the District Court with respect to the action against the union. The union sought Certiorari and this Court affirmed the holding of the Court of Appeals.

In the *Czosek* decision this Court, speaking through Mr. Justice White, specifically stated that an action against the union

for failure to represent, clearly survives the determination by the Railway Adjustment Board or any of its subsidiaries. On that point Mr. Justice White stated as follows:

> And surely it is beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts. Glover v. St. Louis-S. F. R. Co., 393 U. S. 324, 89 S. Ct. 548, 21 L. Ed. 2d 519 (1969); Conley v. Gibson, *supra.* The claim against the union defendants for the breach of their duty of fair representation is a discrete claim quite apart from the right of individual employees expressly extended to them under the Railway Labor Act to pursue their employer before the Adjustment Board. [footnote omitted] 397 U. S. 26 at pages 27 and 28.

This clear and unequivocal statement of the rights of union members to pursue their union for breach of their duty to fairly represent, is ignored by the decision of the Seventh Circuit in affirming the dismissal of the complaint. It is apparent that the Seventh Circuit, being unable to distinguish, or find any way around this clear and unequivocal statement of the law in *Czosek*, decided that it must ignore that case and the language quoted above. The Seventh Circuit in its decision, nowhere discusses the *Czosek* case, but by its affirmation of the District Court, clearly violates the principle set forth above.[1]

For this reason alone, this Court should grant the Writ of Certiorari.

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1. The Court's attention is directed to the opinion of District Court for the Eastern District of Missouri, reported in the Appendix (A. 3) where the Court holds that it has jurisdiction under Section 1337 of Title 28, U. S. C. A.

CONCLUSION.

The Seventh Circuit decision is in error because it is direct conflict with this Court's decisions in *Glover* and *Czosek* and should be overturned for this reason. It is respectfully submitted, that this Court has provided remedies to the otherwise powerless employee who is caught between the twin giants of the union and the employees, who together would ride rough shod over his various legal rights. All that the petitioner requests is that the Court make available to them the remedy provided by Federal Law. A Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

"Unpublished Order" Not to be cited per Circuit Rule 28

Argued April 3, 1974

April 25, 1974

Before

HON. JOHN S. HASTINGS, *Senior Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

HON. WILLIAM E. STECKLER, *District Judge**

ADAM J. WESTERMAYER, et al.

No. 73-1801 *vs.*

THE PULLMAN COMPANY, et al.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 72-C-2927

WILLIAM J. BAUER, Judge

ORDER

This is an appeal from a judgment of the district court entered on June 20, 1973, dismissing the complaint for the

* Chief Judge Steckler of the Southern District of Indiana is sitting by designation.

reason, among others, that the district court had no jurisdiction to entertain an action against the unions or Pullman because of the plaintiffs' failure to exhaust their administrative remedies.

While the parties have raised several different issues upon appeal, the issue of whether the trial court erred in concluding that it lacked jurisdiction over the controversy is dispositive of the other issues. In a period of three years the appellants have made no bona fide effort to resort to their internal union remedies pursuant to the collective bargaining agreement.

Upon the basis of the briefs, the oral argument and the record, we conclude that the trial court correctly found that it lacked jurisdiction over the subject matter. *See, Andrews* v. *Louisville & Nashville R. R. Co.*, 406 U. S. 320 (1972). The judgment is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT

* * (Caption—72-C-166(3)) * *

MEMORANDUM AND ORDER

This matter is before the court on motions of defendant The Pullman Company ("Pullman") and defendants Sheet Metal Workers' International Association, International Brotherhood of Firemen and Oilers, International Brotherhood of Electrical Workers, International Association of Machinists and Aerospace Workers, Brotherhood of Railway Carmen of America, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (collectively referred to as "the Unions"). Pullman has moved to quash service of process, to dismiss for lack of subject matter jurisdiction and improper venue, and to dismiss the class action as improper. The Unions have moved to dismiss for lack of subject matter jurisdiction and have moved for summary judgment.

The factual background of this case is as follows. The Unions were the statutory bargaining representatives of plaintiffs under the Railway Labor Act, 45 U. S. C. § 151 et seq. Plaintiffs were employees of Pullman, a carrier under the Railway Labor Act. On November 4, 1968, the Unions sent to their members a strike ballot concerning a proposed amendment by the Unions to the collective bargaining agreement. The proposed amendment provided that all employees who were in service on October 17, 1968 would be entitled to a separation allowance if they were furloughed. The strike ballot provided that if a majority of the membership so voted, the Unions would strike Pullman unless "a prompt and acceptable settlement of this dispute cannot be secured otherwise." A majority of the members of the Unions voted affirmatively on the strike ballot. Pullman refused to accept the amendment. On January 16, 1969, Pullman and the Unions amended the collective bargaining agreement to provide that all employees on active serv-

ice on January 1, 1969 would receive a separate allowance if furloughed. Plaintiffs were all furloughed prior to January 1, 1969 and accordingly did not receive a separation allowance. Plaintiffs contend that the Unions breached their duty of fair representation for all employees by entering into the January 16, 1969 agreement. Plaintiffs also contend that Pullman entered into the agreement knowing that the Unions had breached their duty, and consequently Pullman breached its duty to bargain fairly and in good faith. Plaintiffs also allege a conspiracy between Pullman and the Unions and finally contend that as a result of all of the above, they were each wrongfully discharged and denied a separation allowance.

I

Subject Matter Jurisdiction

Plaintiffs state that this court has jurisdiction of the subject matter of the claim under 28 U. S. C. § 1337 in that the claim arises under the Railway Labor Act, 45 U. S. C. § 151 et seq. Under § 1337, jurisdiction is conferred on the district courts in any case "arising under any Act of Congress regulating commerce. . . ." It is well settled that the Railway Labor Act is an Act of Congress regulating commerce within the meaning of § 1337. See, e.g., *Felter* v. *Southern Pacific Co.*, 359 U. S. 326, 329. It is also clear that a claim against the statutory representative of a craft for breach of its duty of fair representation and against the carrier for receiving the benefit of that breach is a case arising under the Railway Labor Act. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192. Pullman contends, however, that the issue of subject matter jurisdiction was determined in their favor in a previous action brought against them by plaintiffs on the same claim and consequently that issue cannot be relitigated because of the doctrine of res judicata. All defendants contend that this court is without jurisdiction because plaintiffs failed to exhaust available remedies under the collective

bargaining agreement and because the Railroad Adjustment Board has exclusive jurisdiction over this claim under 45 U. S. C. § 153 First (i).

A. *Res Judicata and Exclusive Jurisdiction of the Railroad Adjustment Board*

Plaintiffs previously brought an action against Pullman alone on substantially the same claim upon which the present action is based. The suit was originally filed in the Circuit Court of the City of St. Louis, Missouri, but was removed to this court by Pullman. See 28 U. S. C. § 1441 et seq. The complaint was dismissed without prejudice for lack of jurisdiction over the subject matter. *Westermayer* v. *Pullman Co.*, 331 F. Supp. 328 (E. D. Mo. 1971) (Wangelin, J.). Plaintiffs' appeal from that decision was dismissed by the United States Court of Appeals for the Eighth Circuit for want of prosecution. (*Order* dated October 28, 1971).

Application of the principles of res judicata is not restricted to questions on the merits of a claim but includes jurisdictional questions as well. *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78; *Stroll* v. *Gottlieb*, 305 U. S. 165, 172; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166; *M'Cormick* v. *Sullivant*, 23 U. S. (10 Wheat.) 192; and *see generally* 1B J. Moore, Federal Practice ¶ 0.405[5], at 655 (2d ed. 1965). A dismissal for lack of subject matter jurisdiction does not extinguish a plaintiff's cause of action, *Smith* v. *McNeal*, 109 U. S. 426, 429, but "constitutes a direct estoppel only as to the matters that were adjudged." 1B J. Moore, Federal Practice ¶ 0.405[5], at 661 (2d ed. 1965).

In the previous action by plaintiffs against Pullman, it was held that 45 U. S. C. § 153 First (i) conferred jurisdiction on the Railroad Adjustment Board to hear the claim presented and not on the District Court. The court found that the dispute as alleged in the complaint was one between a group of employees and a carrier and that under such facts the Railroad

Adjustment Board had exclusive jurisdiction to deal with a dispute arising from a collective bargaining agreement. In the present action, plaintiffs have named the unions as co-conspirators and thus the cause of action is no longer between a group of employees and a carrier, and the Railroad Adjustment Board does not have exclusive jurisdiction. *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U. S. 324 (1969). This court, therefore, has subject matter jurisdiction unless the judgment in the prior action is determinative here. Application of the principles of res judicata, as between the parties to a previous action, is generally not affected by the addition or deletion of other parties in the subsequent action. *Restatement of Judgments* § 79, comment i at 358 (1942). Absent some element of estoppel, however, the present action presents a different cause of action—one, which is, by the nature of the parties, outside the reach of 45 U. S. C. § 153 First (i).

Pullman contends that plaintiffs could have litigated in the previous action the precise question presented here had they joined the Unions as defendants, and that their failure to do so should bar them from reasserting subject matter jurisdiction by adding the Unions as additional defendants. The answer to that contention is that a judgment dismissing an action for lack of subject matter jurisdiction operates as a direct estoppel, preventing relitigation only of questions actually decided in the previous action. Res judicata operates as a bar only where the previous judgment was *on the merits*. *Smith* v. *McNeal, supra; Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *Restatement of Judgments* § 49 (1942) and cases cited in Supplements. The dismissal of the previous action without prejudice for lack of subject matter jurisdiction was not on the merits. See Fed. R. Civ. P. 41(b): ". . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction, . . . or for failure to join a party under Rule 19*, operates as an adjudication upon the merits." (Emphasis supplied).

This court concludes, for the reasons stated above, that the judgment in the previous action, *Westermayer* v. *Pullman Co.*, 331 F. Supp. 328 (E. D. Mo. 1971), is not res judicata in this action on the question of subject matter jurisdiction. The court further concludes, since the dispute in the present action is between the employees on the one hand and the Unions and carrier (Pullman) on the other, that the Railroad Adjustment Board does not have exclusive jurisdiction of this dispute under 45 U. S. C. § 153 First (i). *Glover* v. *St. Louis-San Francisco Ry. Co., supra.*

B. *Failure to Exhaust Remedies Under the Collective Bargaining Agreements*

All defendants contend that this court is without jurisdiction of this action because plaintiffs failed to exhaust the remedies provided them under their collective bargaining agreements.

Plaintiffs allege in paragraph 5 of the complaint:

> "[T]his dispute cannot be fairly and justly heard by any type of railroad board of adjustment because said board is made up solely of members whom claimants allege violated the statute as hereinafter set out and could not hear the dispute without prejudice or with impartiality."

In addition, each plaintiff has filed an affidavit stating:

> "That he and other employees involved asked the local chairman and the Pullman superintendent if they could file a claim and they were told that it would not do them any good because the effective date of January 1, 1969, was already set and agreed upon between Pullman Company and the Unions."

The affidavits also state that plaintiffs made repeated attempts to contact other Union officials but received no response. The Unions have filed affidavits stating that plaintiffs did not *file* any complaints with the Unions, but the affidavits do not contradict plaintiffs' statements in their affidavits that they were told it would "not do them any good" to file complaints

In *Glover* v. *St. Louis-San Francisco Ry. Co.*, supra, 393 U. S. 324, the Supreme Court said:

> "The circumstances of the present case call into play another of the most obvious exceptions to the exhaustion requirement—the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile. In a line of cases beginning with *Steele* v. *Louisville & Nashville R. Co., supra,* the Court has rejected the contention that employees alleging racial discrimination should be required to submit their controversy to 'a group which is in large part chosen by the [defendants] against whom their real complaint is made.' 323 U. S., at 206. And the reasons which prompted the Court to hold as it did about the inadequacy of a remedy before the Adjustment Board apply with equal force to any remedy administered by the union, by the company, or both, to pass on claims by the very employees whose rights they have been charged with neglecting and betraying. Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile. Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox*, is easily satisfied by petitioners' repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them. The allegations are that the bargaining representative of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race. If that is true, insistence that petitioners exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled." 393 U. S. at 330-31.

Here the complaint alleges that the Unions wilfully failed to represent the interests of plaintiffs in obtaining severance pay upon furlough. This court concludes that it would be wholly futile to require plaintiffs to take their complaint to the Unions under the collective bargaining agreements before seeking relief in this court.

For the reasons stated above, this court concludes that it has jurisdiction over the subject matter of this action under 28 U. S. C. § 1337. Accordingly, the motions of Pullman and the Unions to dismiss for lack of subject matter jurisdiction are denied.

II.

Personal Jurisdiction Over Pullman

Having determined that this court has subject matter jurisdiction, we next proceed to consideration of Pullman's motions to quash service of process for want of personal jurisdiction. A brief history of plaintiffs' efforts to obtain service on Pullman is therefore in order. Personal service was made on Pullman at its offices in Chicago, Illinois on April 4, 1972. Pullman filed a timely motion to quash this service. On June 16, 1972, plaintiffs were granted leave to apply for an alias summons and reserve Pullman through the Secretary of State of Missouri. Service was made through the Secretary of State on Missouri on June 29, 1972. On August 1, 1972, plaintiffs requested personal service on Pullman at its offices in Chicago, Illinois, and that service was made on August 9, 1972. On September 8, 1972, Pullman filed a motion to quash the alias summons served on August 9, 1972. On September 15, 1972, plaintiffs again caused a summons to be issued for service on Pullman through the Secretary of State of Missouri.

Pullman has filed by leave a motion to quash the service of process made on it through the Secretary of State of Missouri on June 9, 1972 and the additional summons issued on September 15, 1972.

Rule 4(e), Federal Rules of Civil Procedure, provides that service of process may be made on a party not an inhabitant of or found within the state where the district court is held under the circumstances and in the manner prescribed in a statute or rule of that state. Thus Rule 4(e) directs the district court to the laws of the state where it sits in determining the

validity of service of process authorized by state statute or rule. *Thill Securities Corp.* v. *New York Stock Exchange*, 283 F. Supp. 239, 242 (E. D. Wisc. 1968); 2 J. Moore, Federal Practice ¶ 4.32[2], at 1232 (2d ed. 1967); 4 C. Wright & A. Miller, Federal Practice and Procedure, § 1083, at 335 (1969).

Plaintiffs' efforts to serve Pullman through the Secretary of State of Missouri call into play section 351.645, 1(2), V. A. M. S., and the efforts to make personal service on Pullman at its Chicago, Illinois offices call into play section 506.500, V. A. M. S.

Section 351.645, V. A. M. S., provides in pertinent part:

> "1. A foreign corporation authorized to transact business in this state may withdraw from this state upon procuring from the secretary of state a certificate of withdrawal. In order to procure such certificate of withdrawal, such foreign corporation shall file with the secretary of state an application for withdrawal, in duplicate, which shall set forth.
>
> * * *
>
> (2) That it revokes the authority of its registered agent in this state to accept service of process and consents service of process in any suit, action, or proceeding based upon any cause of action arising in this state during the time the corporation was licensed to transact business in this state may thereafter be made on such corporation by service thereon on the secretary of state;."

At the time of the events alleged in the complaint, Pullman was licensed to transact business in Missouri. Subsequently, Pullman was issued a certificate of withdrawal. In its application for withdrawal, Pullman signed the statement required by section 351.645, 1(2), V. A. M. S. It is clear that the cause of action arose during the time Pullman was licensed to transact business in Missouri. The issue raised by Pullman's motion to quash the alias summons directed to the Secretary of State of Missouri is whether the cause of action pleaded in the complaint is one "arising in Missouri". The court has not found and the parties have not cited any Missouri court decision in

which the phrase "cause of action arising in this state" is defined for purposes of section 351.645, 1(2), V. A. M. S.[1] Plaintiffs have filed affidavits stating that they were employed in St. Louis, Missouri by Pullman, that they executed their strike ballots in St. Louis, Missouri, that they were assured by their local union chairman and a Pullman superintendent that they would receive severance pay if they were furloughed, and that they were furloughed without severance pay. As earlier noted, plaintiffs contend that the Unions breached their duty of fair representation and that Pullman breached its duty to bargain in good faith by entering into the agreement of January 16, 1969. Pullman, however, has filed uncontradicted affidavits stating that all of the negotiations and the final execution of the agreement of January 16, 1969 occurred at Pullman's offices in Chicago, Illinois. It therefore appears from plaintiffs' complaint and Pullman's uncontradicted affidavits that the alleged wrongful actions occurred, if at all, in Chicago, Illinois. And these alleged wrongful actions occurred subsequent to the time plaintiffs signed their strike ballots in St. Louis, Missouri. The only factor connecting the State of Missouri and the wrongful actions aileged by plaintiffs is that plaintiffs were employed in Missouri. This court does not believe that the courts of Missouri, would, on the basis of these affidavits and the complaint, conclude that the cause of action pleaded is one "arising in this state" within the meaning of 351.645, 1(2), V. A. M. S.

Plaintiffs' efforts to make personal service on Pullman at its Chicago, Illinois offices call into play section 506.500, V. A. M. S., which provides:

> "Actions in which outstate service is authorized
>
> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corpo-

1. One Missouri court has stated: "[t]he word 'arising' conveys the idea of something coming into action or coming into being or becoming operative." *White* v. *Hashburgh*, 124 S. W. 2d 560, 564 (Mo. App. 1939).

ration, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act with this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting.

2. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

It is clear from a reading of the statute that the cause of action must arise out of the doing of certain specified acts within the state. See also, *State ex rel. Deere & Co.* v. *Pinnell*, 454 S. W. 2d 889, 893 (1970) (en banc). It was concluded above that the cause of action arose, if at all, out of the negotiation and execution of the agreement of January 16, 1969. It is clear then that the cause of action arose out of the *acts* of negotiation and execution of the agreement in Chicago, Illinois and not out of the act(s) of the transaction of business by Pullman in the State of Missouri. Therefore, subsection 1 (1) is not a basis for personal service on Pullman outside the state. It is undisputed that the agreement of January 16, 1969 was negotiated and executed in Chicago, Illinois. Therefore, subsection 1(2) is not a basis for personal service on Pullman outside the state. It has already been concluded above that the wrongful acts, if any, occurred during the negotiation and execution of the agreement in Chicago, Illinois. Therefore, subsection 1(3) provides no basis for personal service on Pullman outside the state. Subsections 1(4) and (5) are clearly inapplicable.

For the foregoing reasons, this court concludes that neither § 351.645 nor § 506.500 provides a valid basis for service of process on Pullman. Accordingly, Pullman's motions to quash service of process through the Secretary of State of Missouri and to quash personal service of process made in Chicago, Illinois are granted.

This court is of the opinion that the part of this Order granting Pullman's motion to quash service of process involves a controlling question of law. Plaintiffs have attempted to obtain service of process on Pullman under sections 351.645 and 506.500, V. A. M. S. These two state statutes appear to be the only arguably applicable vehicles for obtaining service on Pullman in this action. This court is of the opinion that there is substantial ground for difference of opinion as to whether the cause of action pleaded is one "arising in this state" within the meaning of section 351.645, V. A. M. S. and whether the cause of action arose from the transaction of any business, the making of any contract, or the commission of a tortious act within this state as those terms are used in section 506.500, V. A. M. S. It appears there are no clearly controlling decisions of Missouri courts on these two points. This court is also of the opinion that an immediate appeal from the part of this Order granting Pullman's motion to quash will materially advance the ultimate termination of the litigation. If the part of this Order granting Pullman's motion to quash is not decided on interlocutory appeal, this court may have to conduct a separate trial on plaintiffs' claim against Pullman after the trial and possible appeal of the action against the Unions, should the ruling on this point be reversed at such time. 28 U. S. C. § 1292.

The court is not inclined to deal with the venue question pending a final resolution of the issue of personal jurisdiction. If plaintiff prevails on the interlocutory appeal, the court will seriously consider transferring the case to the Northern District of Illinois. As alternatives to an interlocutory appeal, plaintiffs

may wish to consider dismissing their present action and refiling in the Northern District of Illinois, or requesting this court to transfer the case to the Northern District of Illinois where plaintiffs may obtain personal jurisdiction without question over defendant Pullman.

The court reserves at this time determination of defendant Union's contention that the complaint fails to state a claim upon which relief can be granted.

So Ordered.

Dated: October 13, 1972.

/s/ WILLIAM H. WEBSTER
United States District Judge

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-C-2927) * *

MEMORANDUM OPINION AND ORDER

This cause comes on the defendant unions' motion to dismiss the complaint or in the alternative for summary judgment on their behalf and on the defendant Pullman Company's motion to dismiss.

This is an action based on the alleged wrongful discharge of employees by a carrier and the failure of labor unions to adequately represent their members in violation of the Railway Labor Act, 45 U. S. C. § 151 *et seq.*

The plaintiffs in this action are former employees of the Pullman Company ("Pullman") who worked in St. Louis, Missouri until their furlough from such employment in 1968, and performed the maintenance and repair on passenger cars and equipment used by Pullman in the performance of parlor and sleeping car services for most of the nation's railroads. This action is brought in the names of eight individuals for themselves and allegedly on behalf of additional former Pullman employees said to be similarly situated. The defendants are Pullman, the plaintiffs' former employer, which is a carrier under the Railway Labor Act; and six international and national railway labor organizations described as the collective bargaining representative of plaintiffs during the time they were so employed by Pullman.[1]

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1. The labor organization defendants are:
Sheet Metal Workers' International Association (SMW)
International Brotherhood of Electrical Workers (IBEW)
International Brotherhood of Firemen and Oilers (BF&O)
International Association of Machinists and Aerospace Workers (IAM)

(Continued on Next Page)

The following background facts are important to the proper disposition of the instant motions.

Until the end of 1968, Pullman performed sleeping and parlor car services under a so-called Uniform Services Contract approved by the Interstate Commerce Commission for most of the passenger carrying railroads of the country utilizing in such services Pullman owned passenger cars. The maintenance and repair of this Pullman equipment was performed by Pullman shop craft employees at various locations throughout the nation, including St. Louis, Missouri.[2]

The Transportation Act of 1958 authorized the Interstate Commerce Commission to permit discontinuances of passenger train operations by interstate rail carriers. After passage of this Act it became evident that the number of passenger trains whose operations were being, and would be, discontinued, would substantially reduce the need for a number of Pullman employees engaged in the performance of work in various crafts and classes generally established within the railroad industry, including shop craft employees. During this same period a number of the railroads were withdrawing from their contracts with Pullman, and performing their own sleeping car services.

Brotherhood of Railway Carmen of the United States and Canada (BRC)

International Brotherhood of Fireman and Oilers (BF&O) Blacksmiths, Forgers and Helpers (IBB&B).

2. On January 1, 1969 all of the nation's railroads which continued sleeping car services took over such operations. Most of Pullman's employees were permitted to follow their work and became employees of the railroads by a prior agreement negotiated between shop crafts and other railway labor organizations and the railroads. Shop craft work by Pullman employees continued on a reduced volume until approximately September, 1969 (see the Affidavit of Robert E. Duckworth).

On January 26, 1966, the Federation[3] and Pullman entered into an agreement under which shop craft employees of Pullman were to be protected in their employment by being given the right to become employees of a railroad taking over operation of Pullman's sleeping car services with equal pay, seniority, vacations and other benefits formerly provided them as employees of Pullman.

An agreement was negotiated on July 19, 1966, by the Federation with Pullman to provide for protection of wages, rules, and working conditions of employees who would be required to "follow their work" with Pullman to new locations in order to retain Pullman employment.

After execution of the July 19, 1966 agreement, it became evident that the reduction in sleeping car service by the railroads would not provide for absorption of shop craft employees of Pullman, who desired to follow their work to railroad employment under the provision of the 1966 agreement.[4] The July

3. During the relevant period the Brotherhood of Railway Carmen of the United States and Canada ("Carmen") and the International Brotherhood of Electrical Workers ("IBEW") [jointly referred to as "Brotherhoods"] were the collective bargaining representatives under the Railway Labor Act, 45 U. S. C. § 151, *et seq.*, for the eight named plaintiffs (see Affidavits of Webb and De Gregorio). Five of said plaintiffs were formerly members of and represented by Carmen and three were members of and represented by IBEW. Such representation was furnished through national officers of the Brotherhoods in conjunction with the members of System Federation No. 122 ("Federation") and the Railway Employee's Department, AFL-CIO ("Department"). The Brotherhoods are the collective bargaining representatives for a number of other railroad employees performing similar duties as employees of the nation's railroads. The Brotherhoods and the other four (4) union defendants comprise the membership of the Department. The Federation was composed of other members of the defendant unions, each of whom had been elected as General Chairmen by Pullman employees, including plaintiffs who were members of one of the six shop craft unions.

4. By October 30, 1968, a majority of railroads had notified Pullman that effective January 1, 1969, they would take over and operate their own sleeping car services. The Federation was so advised by Pullman.

1966 agreement, furthermore, provided no protection as to wages or for separation allowances for employees whose services were not required by Pullman as a result of the decline in the volume of operations continued by it.

Accordingly, on September 16, 1968, the Federation served a Section 6 notice (45 U. S. C. § 156) under the Railway Labor Act on Pullman requesting modification and amendment of the July 1966 agreement so as to provide for severance pay-separation allowances to those shop craft Pullman employees not able to follow their work and become employees of the railroads under the January 1966 agreement, and who were no longer needed by Pullman, and thus would ultimately lose all employment. This notice sought to amend the July 19, 1966 agreement and resolve the controversy.[5]

A number of conferences were held thereafter by representatives of Pullman and the Federation without reaching an agreement. A strike vote was taken and the strike ballots disclosed an almost unanimous vote in favor of a withdrawal from service if the efforts of the Federation were unsuccessful in negotiating an acceptable agreement. At the same time, and as provided for by the Railway Labor Act, the Department acting on behalf of the Federation, requested the assistance of the National Mediation Board to mediate the dispute.[6] On or about November 27, 1968 mediation by the National Mediation Board ("Board") had failed to bring about an amicable settlement and the Board's request for arbitration pursuant to Section 8 of the Railway Labor Act, 45 U. S. C. § 158, was declined by one of the

5. The Federation sought to amend the 1966 agreement by adding the following provision:

> "Notwithstanding anything to the contrary contained in the Agreement of July 19, 1966 said Agreement shall be amended to provide that all employees who are in service on October 19, 1968 will, if furloughed, be entitled to a separation allowance, computed on the basis of the schedule set forth in Section 9 of the Washington Job Protection Agreement." (See Duckworth Affidavit.)

6. See Duckworth Affidavit.

parties. The Board gave notice that as of November 29, 1968 its services at resolving the controversy were terminated pursuant to the Act.

As provided by Section 6 of the Act, the employees and Pullman were required to maintain the *status quo* in employment conditions for a further 30 day period from termination of mediation services by the Board, but subsequent to that date (after December 29, 1968) would be permitted to resort to what is commonly referred to as "self-help". The Federation informed Pullman that it was setting December 31, 1968 as a strike date, but on December 12, 1968 upon being advised by Pullman representative Boechelman that such a strike date would not afford him sufficient time to consult with and obtain the views of the railroads who were the owners of Pullman on the proposed agreement, the Federation changed the strike date to January 17, 1969. On January 13, 1969, and because of the imminence of the January 17 strike date, "hard" negotiations resumed, and were completed on January 16, 1969. In these final negotiations, Pullman representative Boechelman refused to agree to a protective date retroactive to October 17, 1968, insisted upon a more "current" date, and indicated an effective date of January 1, 1969, might be acceptable to Pullman's owning railroads.

Using January 1, 1969 as the effective date of the agreement meant that all Pullman shop craft employees in active service as of that date, if later furloughed by Pullman, would receive separation allowances. The Federation was aware that this effective date for the agreement meant that all Pullman shop craft employees in active service on that date, when later furloughed by Pullman, would receive separation allowances. The Federation was aware that an effective date of October 17, 1968 would provide for separation allowances to 630 Pullman shop craft employees; that approximately 70 of such employees had been furloughed by Pullman during the period October 17 and December 31, 1968; that an additional 45 such employees had been furloughed by Pullman on January 10, 1969; and that the

cost to Pullman of paying separation allowances to 560 shop craft employees—or those in active service on January 1, 1969 —would approximate, by defendant's estimate, six million dollars. The Federation voted to accept the January 1, 1969 effective date unless a further compromise could be reached with Pullman. The further efforts by the Federation to have the agreement provide for an earlier effective date were unsuccessful and the agreement was executed by the Federation and Pullman on January 16, 1969.[7]

The gravamen of plaintiffs' complaint is that they were unlawfully deprived of severance pay because the 1969 agreement between the Federation and Pullman on behalf of all Pullman shop craft employees required that a Pullman shop craft employee be in active service on January 1, 1969 to be entitled to receive severance pay when ultimately furloughed by Pullman. Plaintiffs contend that the active service qualifying date should have been October 17, 1968, which date was sought unsuccessfully in the negotiations between Federation and Pullman. The eight named plaintiffs were furloughed by Pullman during the period October 17 and December 31, 1968.[8]

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7. See Duckworth Affidavit.

8. The individually named plaintiffs and the group of former Pullman employees said to be represented by them are the same plaintiffs who in 1971 brought a similar action against Pullman. In that action, which was filed in the Circuit Court of the City of St. Louis and removed to the United States District Court for the Eastern District of Missouri, Eastern Division, plaintiff alleged in somewhat similar terms to those in the instant complaint that the 1969 agreement was unlawful and in violation of the provision of the Railway Labor Act, 45 U. S. C. § 151 *et seq.* See *Westermayer* v. *Pullman* (E. D. Mo.), Case No. 71 C 225. In an opinion entered August 17, 1971, the Honorable H. Kenneth Wangeline, writing for that court, dismissed without prejudice for lack of jurisdiction the complaint then filed by plaintiffs. Judge Wangeline found that the plaintiffs had not alleged exhaustion of their administrative remedies.

In their present complaint, plaintiffs, seeking to cure the pleading deficiency found in their former complaint, now, in part, allege contention that the defendant unions through their agents and General Chairmen, conspired with Pullman so as to ignore the will of their members and enter into the unlawful agreement with Pullman.

(Continued on Next Page)

The defendant unions in support of their motion to dismiss or in the alternative for summary judgment contend:

1. The Court has no jurisdiction to interpret, and apply the provisions of collective bargaining agreements, or to reform the same, or to adjudicate disputes arising thereunder and grant damages for violation of such agreements.
2. The Court has no jurisdiction to entertain an action against the Brotherhoods because of the failure of plaintiffs to exhaust administrative remedies provided by the Brotherhoods.
3. The defendant unions have not violated any duty owed to the plaintiffs to fairly represent them in grievances against Pullman concerning severance pay or otherwise.
4. The complaint's conclusory allegation of conspiracy between defendants to deprive plaintiffs of the benefits of the 1969 agreement is shown to be without factual support, to be refuted by the undisputed relevant material facts of the dispute, and is not an issue properly before the Court.

The plaintiff in opposition to the defendant unions' motion contends that the same motion was filed in the District Court from whence this cause was transferred, was denied by that

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The unions have here been added in this action as defendants (see Paragraphs 8, 9, and 10 of the Complaint).

This action was initially filed by plaintiffs in the U. S. District Court for the Eastern District of Missouri, Eastern Division. Responsive to the suggestion by Judge Webster of that court, plaintiffs requested that the case be transferred to this Court in whose jurisdiction service of process could be obtained on all the defendants. Prior to the transfer of the cause, Judge Webster entered an order denying a motion for summary judgment filed on behalf of the defendant unions. It is the opinion of this Court that such a ruling by a court which expressly does not have jurisdiction over the whole case cannot have a *res judicata* effect on any motion made by the parties in this Court action.

court, and thus should be denied by this Court. Further, the plaintiffs contend that the complaint adequately states a cause of action against all of the defendants.

The defendant Pullman, in support of its motion to dismiss, contends:

1. Plaintiffs are barred by *res judicata* from asserting that this Court has subject matter jurisdiction over the controversy because the plaintiffs filed in Missouri a virtually identical complaint against Pullman, which was dismissed for lack of subject matter jurisdiction. See *Westermayer, et al.* v. *Pullman Co., et al.* (E. D. Mo.), Case No. 71 C 225.
2. The complaint fails to state a claim upon which relief can be granted.

The plaintiffs in opposition to the defendant Pullman's motion again contend that this same motion was filed in the District Court from whence this cause was transferred, was denied by that court, and thus should be denied by this Court.

It is the opinion of this Court after examining the pleadings that this Court lacks jurisdiction at the present time over the instant complaint.

I.

It Is Not Within This Court's Peculiar Jurisdiction to Interpret, Apply or Reform the Provisions of Collective Bargaining Agreements or to Adjudicate Disputes Arising Thereunder.

It is well established that grievances or disputes arising out of and concerning the interpretation or application of collective bargaining agreements between railroads and their employees may not be resolved by the courts, but must be submitted to a system of compulsory arbitration as set forth in Section 3 of the Railway Labor Act, 415 U. S. C. § 153. *Brotherhood of Railroad Trainmen* v. *Chicago River Indiana Railroad Company,* 353 U. S. 30 (1957); *Diamond* v. *Terminal Ala. State*

Docks, 421 F. 2d 228 (5th Cir. 1970); *Brotherhood of Railroad Trainmen* v. *Denver and Rio Grande Western Railroad Company*, 370 F. 2d 833 (9th Cir. 1966), *cert. denied*, 386 U. S. 1018; *Order of Railroad Conductors & Brakemen* v. *Spokane P & S Ry. Company*, 366 F. 2d 99 (9th Cir. 1966), *cert. denied*, 385 U. S. 1025. "Minor" disputes arising out of interpretations and application of collective bargaining agreements between railroads and their employees are entrusted solely and exclusively to the jurisdiction of the National Railroad Adjustment Board, 45 U. S. C. § 153, First, and other similar boards authorized to be established pursuant to Section 3, Second, of the Railway Labor Act, 45 U. S. C. § 153, Second. *Gunther* v. *San Diego Arizona Eastern Ry.*, 382 U. S. 257 (1965); *Brotherhood of Railroad Trainmen* v. *Chicago River Indiana Railroad Company, supra.* As specifically set forth in Section 3, Second, 45 U. S. C. § 153, Second, the awards of such arbitration boards are final and binding upon the parties to the dispute, and not reviewable on their merits by Federal District Courts.

"Major" disputes go first to mediation; then, if that fails, to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end and either party may resort to self-help. See *Brotherhood of Trainmen* v. *Toledo P & W Ry. Co.*, 321 U. S. 50 (1944); *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (9th Cir. 1959).

There is no jurisdiction in the Federal District Courts to entertain an action for common law damages for an alleged breach of such a contract or for a collateral attack upon the validity of any decision reached thereon by a properly authorized arbitration board. *Union Pacific Railroad Co.* v. *Price*, 360 U. S. 601 (1959); *Edwards* v. *St. Louis-San Francisco R. Co.*, 361 F. 2d 946 (7th Cir. 1966); *Diamond* v. *Terminal Ry. Ala. State Docks, supra.*

It is clear from the pleadings that the plaintiffs have failed to exhaust or even initiate their contractual remedies to determine

the validity of their right to receive separation allowances and have not alleged any reason for their failure to so act.

The fact that the plaintiffs characterize their claim as one for "wrongful discharge" does not save it from the Railway Labor Act's mandatory provision for the processing of grievances. See *Andrews* v. *Louisville & Nashville Railroad Company*, 406 U. S. 320 (1972). Thus the complaint should be dismissed based on the plaintiffs failure to adequately state a cause of action and by their failure to initiate or exhaust their contractual remedies.

II.

This Court Has No Jurisdiction to Entertain an Action Against the Unions or Pullman Because of the Plaintiffs' Failure to Exhaust Their Administrative Remedies.

The defendant unions have submitted affidavits to the effect that their respective constitutions provide for a complete and orderly procedure for the resolution and disposition of any charge brought by a member who believes he has been aggrieved by any act or omission on the part of his union, any of its officers or other members. The affidavits further state that each plaintiff as a member of his Brotherhood is required as a condition of his membership to comply with the provision of his constitution and that none of the plaintiffs filed a claim or grievance with his Brotherhood as to any action or omission on the part of his Brotherhood, its officers or members.[9]

Plaintiffs do not allege that they have resorted to and exhausted their available internal union remedies, and they do not state any reason for having failed to do so. Although the plaintiffs allege that their interests were not properly handled by their unions, plaintiffs do not contend that they at any time complained to their unions of any act or omission of a duty by any officer or other member of the unions with respect to representation of the interests of plaintiffs. Plaintiffs, as members

9. See the Affidavits of Webb and De Gregoria.

of the defendants unions, are bound by the provisions of their constitutions, and are now barred from the institution of legal action against the defendant unions without exhaustion of their internal union remedies. *TAM* v. *Gonzalez*, 356 U. S. 617 (1958).

The Federal Courts have uniformily held that they do not have the right to interfere with the internal management of a union or to entertain an action seeking redress of any alleged wrong by a union against a member thereof in the absence of a showing that the alleged aggrieved member has first exhausted available union remedies, or at least sought to do so. *Tanstall* v. *Brotherhood of Locomotive Engineers*, 323 U. S. 210 (1944); *Neal* v. *System Board of Adjustment*, 348 F. 2d 722 (8th Cir. 1965); *Fingar* v. *Seaboard Airline Railroad Co.*, 277 F. 2d 698 (5th Cir. 1960); *Jackson* v. *Chrysler*, 78 L. R. R. M. 2745 (S. D. Ind. 1971); *Smith* v. *CPC Int'l.*, 72 L. R. R. M. 2846 (N. D. Ill. 1960).

A railway employee who feels that he has been unjustly discharged may use various administrative remedies provided by collective bargaining agreements subject to this chapter and his right of review before the National Railroad Adjustment Board; or may sue the employer for damages without exhausting his contract and administrative remedies if action brought in state court which would allow such action without prior exhaustion provided that he accept his discharge as final. *Belanger* v. *New York Central Railroad Co.*, 384 F. 2d 35 (6th Cir. 1967). The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee, the union and the carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. See *Andrew* v. *Louisville & Nashville Railroad Company, supra.*

Thus the instant complaint should be dismissed because this Court presently lacks jurisdiction over the instant controversy since the plaintiffs have failed to exhaust or even initiate their

contractual and administrative remedies and have not alleged any reason for their failure to so act.

Accordingly it is hereby ordered that the defendant unions' and Pullman's motion to dismiss is granted.

ENTER:

/s/ WILLIAM J. BAUER
Judge

Dated: June 20, 1973

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1913

No. 73-1914

ADAM J. WESTENHAVER, ET AL., Petitioners,

v.

THE PULLMAN COMPANY, ET AL., Respondents.

BRIEF FOR RESPONDENTS
IN OPPOSITION

EDWARD J. HUSSEY, JR.
WILLIAM J. HUSSEY
[illegible]
[illegible]
[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1914

ADAM J. WESTERMAYER, ET AL., *Petitioners,*

v.

THE PULLMAN COMPANY, ET AL., *Respondents.*

BRIEF FOR RESPONDENT UNIONS IN OPPOSITION

OPINIONS BELOW

The petition includes in an appendix thereto not only the opinion of the Court of Appeals for the Seventh Circuit and the opinion of the District Court for the Northern District of Illinois (which was affirmed by the Seventh Circuit), but the opinion of the District Court for the Eastern District of Missouri (Pet. A 3-A 14). The Sheet Metal Workers' International Association, et al. (Union respondents) suggest that the judgment of the latter court is not properly before the Court for consideration.

QUESTIONS PRESENTED

In the opinion of the Union respondents the question presented for review is whether the dispute was properly dismissed by the lower courts in consideration of the issues presented to such courts, in the light of the record upon which the decisions below were based, and without restriction to grounds stated by the lower courts for dismissal.

STATEMENT OF THE CASE

The Union respondents believe that the Statement of the Case set forth in the petition considered together with the facts found by the lower courts as disclosed by the opinions below presents adequately the nature of the dispute.

ARGUMENT

The decision below is clearly correct, and presents no important question of federal law such as to justify granting the writ and review by this Court.

Contrary to the contentions of the plaintiffs, the decision below is not in conflict with *Glover*[1] and *Czosek*,[2] or any other relevant legal authority relied upon by petitioners.

The petitioners are shown to contend that they were unlawfully deprived of the benefits of a collective bargaining agreement negotiated by the respondents on January 19, 1969.

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[1] *Glover* v. *St. Louis-San Francisco R. Co.*, 393 U.S. 324.

[2] *Czosek* v. *O'Mara*, 397 U.S. 25.

As stated by petitioners (p. 5) the substance of their complaint is that the respondent Pullman Company and the respondent Unions

> conspired so as to ignore the will of the members of the unions as voiced in their strike ballot, that defendant Pullman did not bargain fairly and non-discriminately with the railroad unions, that the defendant unions willfully failed to represent the wishes of the majority of its members, especially the plaintiffs, and the defendant Pullmn (sic) Company know (sic) of this when it entered into the agreement.

Briefly restated, the crux of petitioners' claim against the Unions was to charge a breach of the Unions' duty of fair representation owed to the petitioners, because the Unions ignored the will of their members "as voiced in their strike ballots", in the negotiation of the 1969 agreement.

Whereas the Court of Appeals in somewhat cryptic fashion (Pet. A1) summarily affirmed the judgment of the District Court, the opinion of the latter court contains a description of the background of the dispute and the circumstances attending the negotiation of the involved collective bargaining agreement by the respondents on January 16, 1969. The strike ballot referred to by plaintiffs was included in the record before the District Court, and as noted by that court (Pet. A18) the facts of record disclosed that:

> A strike vote was taken and the strike ballots disclosed an almost unanimously vote in favor of a withdrawal from service if the efforts of the Federation were unsuccessful in negotiating *an acceptable agreement.* (Emphasis supplied) [3]

[3] In a letter accompanying the strike ballot sent by the Unions to the Pullman employees involved, it was stated that the purpose

It is thus shown that in executing the strike ballot each of the petitioners had before him the specific language emphasized above in terms calling for his vote in favor of or against a strike if the respondents failed to reach "an acceptable settlement" of the Unions' request that Pullman agree to amend an earlier collective bargaining agreement so as to provide for payment of separation allowances.

Evaluated in the light of these facts, it is shown that petitioners' real grievance resulted from the failure of the respondent Unions to negotiate an agreement containing provisions more favorable to petitioners, an agreement which would have a retroactive effective date prior to January 1, 1969, and thus include petitioners within the group of Pullman shop craft employees who were benefited by the terms of the agreement as negotiated on January 16, 1969, (Pet. A 19-20). The agreement as negotiated benefited 560 of the total 630 employees involved (Ibid).

It is clear that the relevant and material facts relating to the conduct of the representatives of the Union respondents were presented to and were considered by courts below.

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of the strike ballot was to obtain their "honestly expressed views" for or against a strike, and that if a majority voted in favor of a strike "and a prompt and acceptable settlement of this dispute cannot be secured otherwise", each employee whether he voted for or against a strike would strike when so authorized by his union.

The strike ballot which each such employee was requested to execute contained a statement above the place for his signature that he had carefully read, or heard read, the Official Circular and the ballot, and understood that *the question involved* was that of authorizing a strike and fixing the time therefor, in accordance with the laws of the respective organizations, for the purpose of securing *an acceptable settlement* of the pending notice of September 16 1968 . . . (Emphasis supplied).

It is significant in the Court's consideration of the petition to note that while the judgment of the District Court was technically to grant the respondents' motions to dismiss, such facts were presented to the District Court in support of the Unions' motion for summary judgment.[4]

Whereas the District Court (or the Court of Appeals) could have properly granted the Unions' motion for summary judgment, it is suggested that the failure to do so does not require this Court to disturb the judgment below in view of the correct resolution of the dispute.[5]

In summary, the petition presents a question properly to be disposed of by consideration of the rulings of this Court in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330; 337-339, *Humphrey* v. *Moore,* 375 U.S. 335, 349-350, and *Amalgamated Ry. and Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 301, explaining the duty of fair representation owed by the collective bargaining representative to the employees within the bargaining unit and the discretion permitted the representative in the negotiation of collective bargaining agreements. There was no material allegation of fact before the District Court to create a genuine issue of

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[4] It is clear from the District Court's opinion that it considered facts presented to it by affidavits supporting the Unions' alternative motion to dismiss or for summary judgment. It is also clear that the Unions' contention that the petitioners had failed to state a claim entitled to relief as concerned their alleged breach of the duty of fair representation was briefed and argued to the Court of Appeals (Pet. A 2).

[5] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service,* 341 U.S. 246, 249-250; *S.E.C.* v. *Chenery,* 318 U.S. 80, 88; *J. E. Riley Invest. Co.* v. *Commissioner of Int. Rev.,* 311 U.S. 55, 59; *Helvering* v. *Gowan,* 302 U.S. 238, 245-246.

fact, or to support a finding, that the Unions deliberately and in hostile manner discriminated against petitioners.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 1974

Certificate of Service

I certify that service of this brief was made this day by the mailing, postage prepaid, of three (3) copies thereof to counsel for each party of record.

WILLIAM J. HICKEY

July 17, 1974

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No. 73-1914

In the
Supreme Court of the United States
OCTOBER TERM, 1973

ADAM J. WESTERMAYER, et al.,
Petitioners,
vs.
THE PULLMAN COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE OF THE PULLMAN COMPANY TO PETITION FOR CERTIORARI

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RESPONSE OF THE PULLMAN COMPANY TO PETITION FOR CERTIORARI

There are no issues in this case as between petitioners and Pullman which warrant the granting by this Court of the petition for writ of certiorari.

We are not certain what considerations led the Seventh Circuit to conclude, as to Pullman, "that the trial court correctly found that it lacked jurisdiction over the subject matter."

We are certain, however, that there are considerations which wholly justified the affirmance of the dismissal of

the complaint as to Pullman, and which do not conflict with *Glover, et al.* v. *St. Louis-San Francisco Railway Co., et al.*, 393 U.S. 324, and *Czosek* v. *O'Mara*, 397 U.S. 26, relied upon by petitioners.

First, the complaint failed to state a claim upon which relief could be granted as to Pullman, as the Trial Court held. As an examination of the complaint discloses, the essential premise of the complaint is that the unions sent each of their members a circular and strike ballot which sought the approval of the members of a strike in the event that Pullman refused to accept an amendment, to a July, 1966 agreement, providing that all employees of Pullman who were in service on October 17, 1968 would, if furloughed, be entitled to separation pay; that a majority of the union members who voted, voted to strike if Pullman refused to accept the amendment; and that thereafter Pullman and the unions, in violation of the mandate of the strike vote, conspired to enter into an agreement which limited those entitled to separation pay to employees furloughed after January 1, 1969 and which thereby excluded the plaintiffs, all of whom were furloughed between October 17, 1968 and January 1, 1969.

Contrary to the essential premise of the complaint, the circular did not state that the unions would strike if Pullman refused to accept an October 17 effective date. It said, instead, that was the initial demand by the unions on Pullman on September 16. The circular stated further that no agreement had yet been reached with Pullman, that the dispute was being processed through the procedure of the Railway Labor Act, and that:

> "The purpose of this strike ballot, of course, is to seek the honestly expressed views of the employes involved. If the majority of these employes, as re-

quired by the laws of their respective organizations, vote in favor of a strike, *and a prompt and acceptable settlement of this dispute cannot be secured otherwise,* each employe, regardless of how he voted on the strike ballot, will strike when authority to do so is given by the properly constituted authority of the respective organizations. It must be remembered that no strike will occur until it is authorized by the several organizations in strict adherence to their constitutions." (Emphasis added.)

The strike ballot itself, attached to the circular, stated that the members "understand that the question involved is that of authorizing a strike and the fixing of time therefor, in accordance with the laws of the respective organizations, *for the purpose of securing an acceptable settlement of the pending issue* arising out of the organizations' notice of September 16, 1968 requesting that the Agreement of July 9, 1966 be amended to provide for a separation allowance" (emphasis added). Nowhere in either the circular or the strike ballot did the defendant unions seek authorization for a strike in the event Pullman did not agree to an October 17, 1968 effective date.

Plainly, therefore, petitioners could not obtain relief from Pullman on those allegations of the complaint predicated on the faulty premise that a majority of the members of the unions voted to strike in the event Pullman refused to agree to an effective date of October 17, 1968.

The remaining allegations of the complaint are equally without substance.

Certainly, the mere allegation that Pullman did not bargain fairly and nondiscriminately when it did not agree to an October 17, 1968 effective date for the Shopcraft Unions, while agreeing to an effective date prior to October 17, 1968 for severance pay purposes for cer-

tain unions other than the Shopcraft Unions, does not state a claim upon which relief can be granted. Pullman had a right to enter into a severance pay agreement with the Porters and the Clerks providing for one effective date, an agreement with the Conductors providing for a later effective date, and an agreement with the Shopcraft Unions providing for a still later effective date.

It is equally certain that the conclusory allegation that Pullman was prohibited by statute from discriminating among members of the Shopcraft Unions by entering into an agreement which provided separation pay for some but not others does not state a cause of action. Pullman may have had an obligation to treat everyone in the same position equally. That obligation clearly did not prevent Pullman from entering into an agreement on January 16, 1969 providing for an effective date of January 1, 1969, thereby awarding separation pay to all those who were still employed on January 1 but denying it to all those who were furloughed, as the plaintiffs were, before January 1.

Nor do plaintiffs have a cause of action predicated on the allegation that "as a result of the defendants unlawfully and illegally entering into the January 16, 1969, agreement, all of the plaintiffs were wrongfully discharged". The only basis for the assertion that Pullman unlawfully and illegally entered into the agreement of January 16, 1969 is the faulty assumption that the union members voted to strike unless Pullman agreed to an October 17, 1968 cutoff date. No additional facts are alleged to support the conclusion that the plaintiffs were wrongfully discharged.

The second consideration which was wholly dispositive of the case as to Pullman was that the issue whether the

District Court had subject matter jurisdiction of the controversy was *res judicata.*

In early 1971, plaintiffs filed a complaint against Pullman in the Circuit Court of the City of St. Louis, Missouri. A comparison of that complaint with the present complaint reveals only two differences of any significance: In the present complaint, the unions are named as additional defendants, and plaintiffs have added to paragraphs 8 and 10 of the present complaint (parallel to paragraphs 7 and 9 of the Missouri complaint) allegations that they were "wrongfully discharged".

Plaintiffs' first suit was removed to the United States District Court for the Eastern District of Missouri, Eastern Division, as Case No. 71 C 225 (4), where Pullman moved to dismiss on the ground that the Court lacked jurisdiction over the subject matter because plaintiffs had failed to exhaust the administrative remedies provided them by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* On August 17, 1971, Pullman's motion to dismiss was granted, in an opinion reported at 331 F.Supp. 328. Although plaintiffs appealed from that decision, the appeal was dismissed for want of prosecution on October 28, 1971.

Thereafter, plaintiffs filed the present case in the United States District Court for the Eastern District of Missouri, Eastern Division. The case was transferred to the Northern District of Illinois, pursuant to 28 U.S.C. § 1404, by order of the Missouri Court entered on November 14, 1972.

A decision that a Federal Court does not have subject matter jurisdiction of a controversy alleged in a complaint is *res judicata* as to the issue of subject matter jurisdiction in a subsequent suit involving the same par-

ties and the same controversy, 1B *Moore's Federal Practice*, ¶0.405[5], pp. 655, 656, 660; *First Federal Savings and Loan Association* v. *Zequeira*, 305 F.Supp. 37 (D.C. P.R., 1969).

Even if it were held that the decision of the first Missouri Court that it did not have subject matter jurisdiction does not bar, by *res judicata*, the added claim in this case that the plaintiffs were "wrongfully discharged" (which allegation, as we have said, alone in substance distinguishes the allegations of the present complaint from the allegations of the first Missouri complaint), the Trial Court nevertheless did not have subject matter jurisdiction of the additional claim.

In suits asserting a claim for "wrongful discharge", employees are required to exhaust the administrative remedies of the Railway Labor Act, 45 U.S.C. § 153 First (i), see *Andrews* v. *Louisville and Nashville Railroad Co., et al.*, 406 U.S. 320 (1972).

We submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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